Supreme Court, U.S.
FILED
APR 20 1993
OFFICE OF THE CLERK

(4)

No. 92-1436

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, CHARLES J. SCHAFFER, JR.,
Petitioners,

v.

FUQUA INDUSTRIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF

Of Counsel
JAMES J. LEYDEN
FRANK SABATINO
SCHNADER, HARRISON, SEGAL & LEWIS
1600 Market Street
Suite 3600
Philadelphia, PA 19103
(215) 751-2428

KENT CPREK
(*Counsel of Record*)
SAGOT, JENNINGS & SIGMOND
1172 Public Ledger Building
Philadelphia, PA 19106
(215) 351-0615
Attorney for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

9 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. FUQUA AND PBGC CONCEDE THAT THE THIRD CIRCUIT ERRED IN OVERTURNING THE "PRESUMPTION OF CORRECTNESS" UNDER 29 U.S.C. § 1401(a)(3)(A) AS IT MERELY ALLOCATES THE BURDEN OF PROOF TO FUQUA	2
II. THE EFFECT OF THE PRESUMPTION IS DETERMINATIVE OF THE OUTCOME IN THIS CASE AS A REMAND IS NECESSARY	3
A. Public Information Suggests That Fuqua Acted To Avoid Liability	3
B. J.B. Fuqua Rejected Divestiture And Then —Without Explanation—Changed Course	4
C. Fuqua Destroyed Or Withheld Its Transactional Files	5
D. Fuqua Divested Only Subsidiaries Blackened By Withdrawal Liability	5
CONCLUSION	6

TABLE OF AUTHORITIES

Cases Page

Ayers v. Western Line Consolidated School District, 555 F.2d 1309 (5th Cir. 1977) 4
Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, No. 91-904, —— U.S. ——, 112 S.Ct. 2273 (1992) 1
EEOC v. Metal Services Co., Inc., 892 F.2d 341 (3d Cir. 1990) 6
Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 4
Huber v. Casablanca Industries, Inc., 916 F.2d 85 (3d Cir. 1990), cert. dismissed, —— U.S. ——, 113 S.Ct. 1070 (1993) 2
Lavine v. Milne, 424 U.S. 577 (1976) 3
Mammoth Oil Company v. U.S., 275 U.S. 13 (1927) 6
PBGC v. LTV Corporation, 496 U.S. 633 (1990) 2
PBGC v. Yahn & McDonnell, Inc., 481 U.S. 735 (1987) affirming by an equally-divided court, 787 F.2d 128 (3d Cir. 1986) 1
UAW v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972) 5

Statutes and Rules

Bankruptcy Code, 11 U.S.C. § 547 4
Employee Retirement Income Security Act, as amended 29 U.S.C. § 1001 *et seq.*
§ 1391(b) 2
§ 1401(c) 2
§ 1401(a)(3) 1
§ 1401(a)(3)(A) 2, 6
Rules of the Supreme Court of the United States, Rule 46 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1436

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, CHARLES J. SCHAFFER, JR.,

Petitioners,

v.

FUQUA INDUSTRIES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF

ARGUMENT

This case encapsulates three issues which have received attention from this Court:

- The Court has already twice granted certiorari concerning the constitutionality of 29 U.S.C. § 1401 (a)(3), *PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987) affirming by an equally-divided court, 787 F.2d 128 (3d Cir. 1986); *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, No. 91-904, —— U.S. ——, 112 S.Ct. 2273 (1992) (granting certiorari).

- The scope of judicial review of the award of a withdrawal liability arbitrator under 29 U.S.C. § 1401(c) apparently received lengthy deliberation upon a petition for certiorari in *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990). The petition was only recently dismissed pursuant to agreement of the parties under Rule 46 of this Court, —— U.S. ——, 113 S.Ct. 1070 (1993).
- The policy of PBGC to impose a "poison pill" of liability for billions of dollars in pre-acquisition pension debt on a buyer of a troubled company was an underlying factor in *PBGC v. LTV Corporation*, 496 U.S. 633, 110 S.Ct. 2668 (1990). The "accrual" theory of the Fund based on parallel Internal Revenue Code precedent would reject such pre-acquisition liability, at least with respect to multiemployer pension plans using the annualization principle of 29 U.S.C. § 1391(b) in calculating liability.

Given a conflict in circuits and prior indications that the Court considers these issues important, Fuqua and PBGC seek to have this Court weigh facts without the aid of a record.

I. FUQUA AND PBGC CONCEDE THAT THE THIRD CIRCUIT ERRED IN OVERTURNING THE "PRESUMPTION OF CORRECTNESS" UNDER 29 U.S.C. § 1401(a)(3)(A) AS IT MERELY ALLOCATES THE BURDEN OF PROOF TO FUQUA

The briefs in opposition to the Petition for Certiorari for Writ of Certiorari ("Petition") actually make the case for summary reversal. Fuqua makes the implicit admission that the "presumption of correctness" in 29 U.S.C. § 1401(a)(3)(A) is simply a "statutory rebuttable presumption" which follows decades of precedent under the Internal Revenue Code, Brief in Opposition ("Fuqua Brief"), p. 8 & n. 3. This is consistent with the position of the Pension Benefit Guaranty Corporation that the "presumption in [29 U.S.C.] Section 1401(a)(3)(A)

simply delineates the burden of proof in MPPAA arbitration proceedings," Brief Amicus Curiae of the Pension Benefit Guaranty Corporation In Support of Respondent ("PBGC Brief"), p. 7. *Lavine v. Milne*, 424 U.S. 577, 585 (1976) is dispositive of the constitutionality of the statutory presumption as an allocation of the burden of proof on an illicit motive issue.

II. THE EFFECT OF THE PRESUMPTION IS DETERMINATIVE OF THE OUTCOME IN THIS CASE AS A REMAND IS NECESSARY

The impact of the "presumption of correctness" is determinative of the outcome before this Court. A correct view of the statutory burden of proof and its constitutionality requires a remand.

A. Public Information Suggests That Fuqua Acted To Avoid Liability

The arbitrator observed that a party should not be able "to not call witnesses and thus avoid cross-examination [of] the vital facts determinative of the issue at hand," Petition For Writ of Certiorari ("Petition"), p. 51a. This cuts against Fuqua, rather than the Fund, if Fuqua had the burden of proof. An October 1, 1984 Trucking Industry Report of Alex Brown & Sons relates an informed analyst's "presumption" that the Fuqua divestiture of Interstate Motor Freight System ("IMFS") reflected implict concern over "the MEPPA liability and what withdrawal might do to the parent company." [1]

---

[1] The arbitrator refused to allow rebuttal of a surprise Fuqua exhibit of Value Line reports cited in his opinion. As the October, 1984 report shows, the mere lapse of time between the divestiture and collapse of Fuqua creates no irrebuttable presumption against action to evade or avoid liability.

The nation's leading expert on prediction of bankruptcy, Dr. Edward Altman of New York University, testified on behalf of the Fund in the case. His research showed that IFFS was financially similar to Wilson Freight, which collapsed into bankruptcy liquidation at the end of July, 1980—just before J.B. Fuqua changed

B. J.B. Fuqua Rejected Divestiture And Then—Without Explanation—Changed Course

The arbitrator concluded that ". . . it is evident that this spinoff could not have taken place without J.B. Fuqua's approval," Petition, p. 58a. This rejects Fuqua's principal claim that its middle management or Board of Directors made the decision to divest IMFS.

The uncontested testimony of Mr. Slayden, Fuqua's President in 1980, established that J.B. Fuqua rejected a sale, spinoff or other divestiture of IMFS in July, 1980—after formal passage of the Motor Carrier Act of 1980 and consideration of all of the reasons advanced by Fuqua witnesses at the hearing. J.B. Fuqua completely reversed course in August 1980—immediately after a major Wall Street Journal article on withdrawal liability —without giving reasons to anyone orally or in writing. The reasons for the decision are completely unexplained in the absence of his testimony.

The arbitrator's exposition of hypothetical reasons for a spinoff is irrelevant. Under *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416 (1979), quoting *Ayers v. Western Line Consolidated School District*, 555 F.2d 1309, 1315 (5th Cir. 1977), proving "that the same decision would have been justified . . . is not the same as proving that the same decision would have been made."

---

course. He carefully explained that his own research shows only that a company with such characteristics is likely to collapse within the following five years. The actual date of default or collapse can be staved off by bank loans and sales of assets to finance cash losses and other factors. This occurred in this case as unsecured lenders to Interstate worked to avoid collapse until they could obtain security after an initial (and deferred) payment came due in 1983. It is a rare corporate practitioner who has not heard the woeful story of a businessman in financial straits who received oral promises of support from a bank—as long as the bank received security—only to be forced into bankruptcy a year and one day later after the maximum preference period of one year under 11 U.S.C. § 547 had passed.

C. Fuqua Destroyed Or Withheld Its Transactional Files

Transactional files for the spinoff were created but then withheld or destroyed, Petition, p. 67a, so that no "smoking gun" can be found. Fuqua now claims that it should be freed of liability because it has destroyed the core files and documents which are most likely to "mention" withdrawal liability. Compare *UAW v. NLRB*, 459 F.2d 1329, 1340-1341, 1343 (D.C. Cir. 1972) (remand as withholding of documents prevented proof of illicit motive). This is legally and logically equivalent to the plea of the proverbial child who murders his parents and then begs for mercy as an orphan.

The "numerous memoranda" emphasized by PBGC predate J.B. Fuqua's July 1980 decision *not* to divest Interstate.[2] The subsequent documents are limited to a couple of pages of legal memorandum, an (unproduced) tax opinion by Shea & Gould and pre-prepared resolutions of the Board of Directors, Petition, p. 36a. The proposition that Fuqua divested the eighth largest motor carrier on the continent, Petition, p. 62a, during a default in operational financing, with no transactional file or documents has various corporate cousel in Philadelphia rolling in the aisles.

D. Fuqua Divested Only Subsidiaries Blackened By Withdrawal Liability

Fuqua simultaneously divested its only other subsidiary with withdrawal liability exposure—a profitable and unrelated diary in Toledo, Ohio. No other subsidiaries were divested at the time—even unprofitable subsidiaries marked for disposition.

---

[2] PBGC focuses on a purported Merrill Lynch memorandum, PBGC Brief, p. 8 and n.6. The Merrill Lynch memorandum was merely an initial presentation. Merrill Lynch was never hired for the transaction after its initial presentation suggested the need for "due diligence" and a "fairness" opinion.

The arbitrator ruled that such evidence was irrelevant. In *EEOC v. Metal Services Co., Inc.*, 892 F.2d 341, 351 (3d Cir. 1990), the Third Circuit reversed and remanded a similar ruling. It held that evidence that only black employees were subjected to special selection procedures created a *prima facie* case of discrimination.

CONCLUSION

PBGC's point that a court should not decide federal constitutional questions where a non-constitutional ground is available, PBGC Brief at 6, applies more aptly to the Third Circuit decision below than to the claims of Petitioner. The Third Circuit preemptorily overturned an explicit statutory presumption in 29 U.S.C. § 1401(a)(3)(A) on constitutional grounds. Given its proper gloss as an allocation of the burden of proof, the presumption is clearly constitutional in a case involving information within the control of Fuqua Industries.

In *Mammoth Oil Company v. U.S.*, 275 U.S. 13 (1927), this Court entered judgment and reversed a trial court decision disregarding a critical "missing witness" and directed entry of judgment for the government as a matter of law. At a minimum, a remand for reconsideration by the arbitrator under the correct statutory procedure and burden of proof is required to enforce the statutory procedures specified by Congress.

Respectfully submitted,

Of Counsel
JAMES J. LEYDEN
FRANK SABATINO
SCHNADER, HARRISON,
SEGAL & LEWIS
1600 Market Street
Suite 3600
Philadelphia, PA 19103
(215) 751-2428

KENT CPREK
(*Counsel of Record*)
SAGOT, JENNINGS & SIGMOND
1172 Public Ledger Building
Philadelphia, PA 19106
(215) 351-0615
Attorney for Petitioners